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October 27, 2003

Ms. Marlene Dortch
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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OCT 27 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

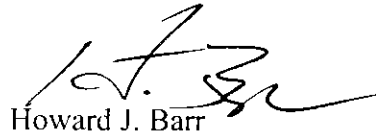
Re: Wt Docket No. 03-203
Petition to Deny

Dear Ms. Dortch,

Transmitted herewith is an original and four copies of Northwest Communications, Inc.'s Petition to Deny the applications for assignment of license submitted in the above-referenced docket.

Should any questions arise in connection with this matter, kindly contact the undersigned.

Respectfully submitted,


Howard J. Barr

Enclosures

CT-4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C. 20554

RECEIVED

OCT 27 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re)
)
Applications to Assign Wireless)
Licenses from WorldCom, Inc.)
(Debtor-in-Possession) to Nextel)
Spectrum Acquisition Corp.)

WT Docket No 03-203

To Chief, Wireless Telecommunications Bureau

PETITION TO DENY

Northwest Communications, Inc. ("NCI"), by counsel and in response to the Commission's Public Notice, DA 03-2948, released September 25, 2003, hereby petitions the Commission to deny the applications ("Applications") under consideration in the above-captioned docket.¹ NCI has standing to file this Petition. As set forth more fully herein, it has suffered a direct injury by virtue of a continuing violation of the Commission's Rules.² The following is submitted in support thereof

NCI provides WorldCom with telecommunications and related services (collectively, the "NCI Services") pursuant to the terms of an agreement dated May 6, 2002 (the "NCI Agreement"). Pursuant to the NCI Agreement, WorldCom leases spectrum capacity from NCI via NCI's MMDS station WHT644 authorized to transmit from a tower located at 216 Paoli Avenue, Philadelphia, Pennsylvania (the "Paoli Tower") using specifically defined transmitters and "network equipment" and operating at a specifically defined elevation.

¹ The applications have been filed in furtherance of an Asset Purchase Agreement (the "Nextel Agreement") between WorldCom, Inc. and Nextel Spectrum Acquisition Corp. ("Nextel")

² This Petition to Deny is submitted under the Declaration Under Penalty of Perjury of Francis E. Martin, NCI's President

The NCI Agreement imposes several obligations on WorldCom in addition to the obligation to make monthly royalty payments. First, it requires WorldCom to “. . . utilize sufficient Capacity on the Channels in order to preserve the FCC License in accordance with FCC rules.” NCI Agreement at ¶ 2(b). This requirement that WorldCom utilize capacity on the channels is critical because, if the capacity is not utilized then the authorization is subject to the automatic forfeiture provisions of the FCC’s rules. Section 21.303(d) of the FCC’s rules, 47 C.F.R. Section 21.303(d). Second, the NCI Agreement requires WorldCom to lease to NCI certain transmission equipment (the “Leased Equipment”) installed by WorldCom. The Leased Equipment is critical because it is necessary to the operation of WHT644 and allows the station to operate in conformance with its Commission authorization.³

WorldCom utilize(d) the Paoli Tower pursuant to a lease dated October 16, 1989 (the “Paoli Tower Lease”). Pursuant to the Paoli Tower lease, WorldCom has “. . . the exclusive right to broadcast or otherwise transmit from the Tower all MDS, MMDS, ITFS or OFS signals except that Lessor shall have the right to broadcast from the Tower MDS Channel 1” (the “Exclusivity Clause”). October 16, 1989 Lease at p. 3.

The Nextel Agreement provides the following treatment relating to NCI’s contractual and ownership rights:

a. The NCI Agreement – the Nextel Agreement identified the NCI Agreement as a contract that WorldCom would assume and assign to Nextel, but granted Nextel the right to elect to exclude and not acquire the NCI Agreement. See, Nextel Agreement at ¶

³ NCI also owns certain equipment located at the Paoli Tower that is/has been used by WorldCom pursuant to the NCI Agreement.

2 07(a) Nextel indeed elected not to assume the NCI Agreement and WorldCom recently filed a pleading with the Bankruptcy Court stating that it intends to reject the NCI Agreement.

b The Leased Equipment -- While it was not clear as to whether WorldCom sought to sell these assets through the Nextel Agreement it has become clear that Nextel has agreed to take assignment of these assets

c The Paoli Tower Lease -- the Nextel Agreement provided for the assumption and assignment of the Paoli Tower Lease. See, Nextel Agreement at ¶ 2.02(1) Nextel has agreed to take assignment of that asset.

d Continued Access to the Leased Equipment -- Nextel agreed that, with respect to a rejected spectrum lease such as the NCI Agreement, that under certain limited conditions it will provide the lessor with continued access to the Leased Equipment. First, Nextel agreed to provide continued access only for so long as it continues to operate such equipment. Continued access is also conditioned upon Nextel's receipt of a written agreement to the effect that, among other things:

- Nextel disclaims any obligation to maintain such equipment;
- The lessor may access such equipment **only** if Nextel will not incur any fees or costs, and **only** if Nextel gives its prior consent to the lessor's access and either the applicable tower lease permits Nextel to grant such access or the lessor has obtained permission from the tower owner to gain access,
- **Lessor not agreeing to lease the spectrum to any entity other than Nextel.**

These conditions gut the right to access and amount to restrictive covenants in that these self serving Nextel provisions give Nextel the right to *de facto* manipulate NCI's business relationships. They do not even guarantee NCI's continuing ability to operate its station from its authorized location

While Nextel will not be leasing spectrum capacity from NCI, by virtue of the foregoing, it clearly retains dominion over NCI's ability to operate MMDS station WHT644. Under these dictates, NCI has little or no option but to operate the station itself – with limited access to the Leased Equipment thus impairing its ability to maintain and otherwise ensure that the Leased Equipment is functioning properly – or to lease capacity to Nextel on whatever terms and conditions Nextel might dictate given that NCI will lose access to the Leased Equipment should it lease capacity to an entity other than Nextel.⁴

The reasons behind both the restrictive covenants in the Nextel Agreement and the Exclusivity Clause are easily fathomable. Together they give Nextel significant leverage over NCI in any spectrum lease negotiations. Control over a transmitting tower is an oft used tactic by commercial operators in order to secure leverage over licensees, particularly where the licensee will have difficulty staying on the air.⁵

Here, NCI will be completely dependent on Nextel, and its willingness to grant NCI continued access to and shared usage of the Paoli Tower, to perform its license to operate WHT644. The bargaining leverage the sale will provide Nextel in its future dealings with NCI will be profound.

The Exclusivity Clause and the restrictive covenants are both violative of the Commission's rules. Section 21.902(b)(1) of the rules provides that:

(b) As a condition for use of frequency in this service, each applicant, conditional licensee, and licensee is required to:

⁴ Even with consent, the tower is physically unable to handle the addition of another set of similar "network equipment." Accordingly, NCI must operate from its present location utilizing the Leased Equipment.

⁵ Section 21.303(d) of the Commission's rules provides for the forfeiture of an MMDS authorization in the event the station is not operated for a period of one year.

(1) Not enter into any lease or contract or otherwise take any action that would unreasonably prohibit location of another station's transmitting antenna at any given site inside its own protected service area⁶

The hold the Exclusivity Clause and restrictive covenants place over NCI (and the leverage they provide to Nextel) is only exacerbated by virtue of the Commission's technical rules which require NCI to provide interference protection to stations on adjacent channels.

More specifically, station WHT644 operates on the F Group of channels at the following frequencies 2602 – 2608 (F1), 2614 – 2620 (F2), 2626 – 2632 (F3) and 2638 – 2644 (F4). These channels are interleaved with and adjacent to channels belonging to the E Group of Channels consisting of channels at the following frequencies: 2596 – 2602 (E1), 2608 – 2614 (E2), 2620 – 2626 (E3) and 2632 – 2638 (E4). Additionally, the F4 channel is adjacent to the G1 ITFS channel

The Commission's rules provide that harmful interference exists to an adjacent channel when propagation models determine that the ratio of desired to undesired signal is less than 0dB. *See* 47 C F R Sections 21.902(f)(2)(i) and 74.903(a)(2)(i) NCI, at *WorldCom's* behest, conducted an engineering study on the ability of the FCC licensed G Group licensee to protect NCI's adjacent channel F4 from a location a mere 290 meters removed from WHT644's current

⁶ See also, Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, 13 FCC Red 19112, n. 301 13 CR 614 (1998) (noting that it encourages cooperation between parties on siting issues). Likewise, the Commission's broadcast rules do not authorize the grant of a station license or renewal thereof in the case of a "person who owns, leases, or controls a particular site which is peculiarly suitable for [FM/television] broadcasting in a particular area and (a) which is not available for use by other [FM/television] licensees, and (b) no other comparable site is available in the area, and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of [FM/television] stations that can be authorized in a particular area or would unduly restrict competition among stations." Sections 73.239 and 73.635 of the FCC's Rules, 47 C F R Sections 73.239 and 73.635

site with a reduced (by 139 feet) antenna centerline height.⁷ The study established that the proposal failed to provide adjacent channel interference protection to NCI's Channel F4 as required by Section 74.903(a)(2) of the FCC's Rules. NCI, again *at WorldCom's behest*, petitioned to deny that proposal because of the potential for interference notwithstanding the fact that the potential for interference was de minimis. Nextel could likewise utilize the rules, which do not allow for an interference tolerance, to prevent NCI from similarly seeking to relocate its station

As the G Group licensee is unable to protect NCI's Channel F4 so will NCI be unable to protect the E Group (which is an asset Nextel seeks to acquire) operating from such a location. Any efforts to relocate further would only result in increased interference to the currently collocated E group station or result in prohibited interference to other currently licensed E and G group stations in nearby markets

NCI submitted an objection before the bankruptcy court insofar as WorldCom sought the right to sell to Nextel the NCI Equipment, the Leased Equipment and the Paoli Tower Lease without also requiring that, if Nextel purchases the Leased Equipment and the Paoli Tower Lease, it must also acquire the NCI Agreement. The court denied NCI's objection leaving the Commission as NCI's only avenue of relief. Indeed, WorldCom specifically took the position before the Bankruptcy Court that the issues raised were "FCC issues" that should be addressed in the context of the Commission's review of these assignment applications.⁸

⁷ Application file no. BLNPIF-20020618AAC

⁸ See WorldCom's "Omnibus Reply" in Chapter 11 Case No. 02-13533 (AJG) dated July 18, 2003

The NCI Agreement and the Paoli Tower Lease operate as a integrated unit.⁹ Because the agreements are interdependent, and provide NCI's sole access rights to the Paoli Tower, Nextel should not be permitted to cherry pick by acquiring the Paoli Tower Lease and the Leased Equipment while excluding the NCI Agreement.¹⁰

With the sale of the Paoli Tower Lease and the Leased Equipment and the rejection of the NCI Agreement, as discussed above, NCI has largely been stripped of its ability to access the Paoli Tower and operate WHT644, will be unable to operate from its present location should it choose to lease to another entity and in any event, because of the Exclusivity Clause, cannot obtain access to the Paoli Tower site without Nextel's consent; and has little to no ability to relocate by virtue of the Commission's interference requirements.

NCI has long served the public interest through its operations in Philadelphia. The rejection of the NCI Agreement, the Exclusivity Clause, and the restrictive covenants, individually and as a whole, place the future of those operations in serious jeopardy. The Commission cannot stand idly by while private forces move to usurp its licensee's operations in the public interest

CONCLUSION

Wherefore, the premises considered, Northwest Communications, Inc respectfully requests that the Commission deny the Applications. In the alternative, the Commission should hold that the Exclusivity Clause and the restrictive covenants are in violation of Section 21.902(b)(1) of the Commission's rules. Additionally, the Commission should not permit Nextel

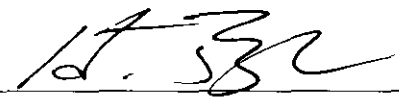
⁹ WorldCom's rights to the Paoli Tower are actually derived from NCI's original rights pursuant to a lease dated August 29, 1986

¹⁰ While Nextel refused to assume the lease out of the bankruptcy, Nextel has more recently indicated that it would "welcome the opportunity to discuss with [NCI] a new leasing relationship with [Nextel]." Exhibit Two hereto

to block an attempted relocation, such as that proposed by the G group licensee in Philadelphia, to the extent that the predicted interference caused by a move is de minimis.¹¹ Finally, the Commission should not allow Nextel to cherry pick and should require it to assume the NCI Agreement along with the Leased Equipment and the Paoli Tower Lease or require it to amend the Paoli Tower lease to delete the Exclusivity Clause and to amend the Nextel Agreement by the deletion of the restrictive covenants. Absent the relief requested here, NCI is completely at the mercy of its competitor Nextel.

Respectfully submitted,

NORTHWEST COMMUNICATIONS, INC.

By: 
Vincent A Pepper
Howard J. Barr

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1401 Eye Street, N.W., 7th Floor
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(202) 857-4400

Attorneys for Northwest Communications, Inc.

October 27, 2003

¹¹ NCI intends to dismiss its currently pending Petition to Deny that application

Exhibit 1


DECLARATION UNDER PENALTY OF PERJURY

I, Francis E Martin, depose and state as follows

1 I am President of Northwest Communications, Inc , the licensee of MMDS station WHT644, Philadelphia, Pennsylvania

2 I have read the foregoing "Petition to Deny" and am familiar with its contents

3 Except for those matters of which the Commission may take official notice, I declare under penalty of perjury that all of the statements made therein are true and correct to the best of my knowledge and belief


Francis E Martin

Date 10/27/03


Tim Donahue
President and Chief Executive Officer

October 14, 2003

Mr Francis E. Martin, President
Northwest Communications, Inc
7900 Germantown Ave
Philadelphia, PA 19118

Dear Mr. Martin

As you know, Nextel Spectrum Acquisition Corp. ("Nextel") has agreed to purchase many of the interests of WorldCom, Inc. and its affiliates in Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS) spectrum. As part of this transaction, Nextel has carefully reviewed WorldCom's existing leases for use of transmission capacity of MDS stations, taking into consideration the particular terms, limitations and cost structures of each lease. Based on this review, Nextel has determined that it is unable to accept assignment of WorldCom's interest in its lease with Northwest Communications, Inc. for use of the transmission capacity on the MDS station facilities licensed to you in the Philadelphia market.

Importantly, we hope you will understand that our inability to accept WorldCom's lease of your facilities was due to the particular details and circumstances of this WorldCom contract. We are interested in and open to the prospect of leasing additional ITFS and MDS spectrum capacity, and would welcome the opportunity to discuss with you a new leasing relationship with us.

We are well aware of what can only be described as a torturous history of attempts at commercial operations in the MDS/ITFS spectrum bands. And we are focused on making the future different. Nextel Communications is a Fortune 300 company with a \$30 billion market capitalization, a leading provider of fully integrated wireless communications services, and has built the largest guaranteed all-digital wireless network in the nation, covering thousands of communities across the United States (reaching 293 of the top 300 U.S. markets). We did so by creating order out of relative chaos in other spectrum bands, using advanced technology and through plain, old-fashioned hard work. Nextel looks forward to drawing upon this unique experience and to the prospect of bringing cutting edge technology and innovative services to MDS and ITFS that are valued by the public and commercially successful.

At Nextel, a new team is being assembled to manage our interests in MDS and ITFS including lease relationships, led by Bill Andrie. Bill and the team are committed to developing

Mr Francis E Martin
October 14 2003
Page 2

mutually rewarding relationships. If you are interested in discussing a leasing relationship,
please contact Bill at (571) 437-9019

Sincerely,

A handwritten signature in black ink, appearing to be "Bill", written in a cursive style.

Certificate of Service

I, Dina Etemadi, a secretary with the law firm of Womble Carlyle Sandridge & Rice, PLLC, do hereby certify that a true and correct copy of the foregoing Petition to Deny was served by U S mail, first class, postage-prepaid on the 27th day of October, 2003, on the following individuals.

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Washington, D C. 20554
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- * Erin McGrath
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Dina Etemadi

* Via Hand Delivery